# In the Supreme Court of the United States.

OCTOBER TERM, 1880.

THOMAS THATCHER
*vs.*
UNITED STATES. } No. 182.

ERROR TO UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK.

## DEFENDANTS' BRIEF.

### STATEMENT.

District court of the United States for the southern district of New York, of May term, in the year one thousand eight hundred and seventy-five.

Before the honorable Samuel Blatchford, district judge.

On the twenty-sixth day of May, in the year one thousand eight hundred and seventy-five, comes George Bliss, esquire, the attorney for the United States in the said southern district of New York, to prosecute a civil action in which the United States are concerned, and informs the court—

That the United States of America hereby bring suit against certain property, to wit, one hundred and two

packages of distilled spirits, seized at 72 Courtlandt street, in the southern district of New York, being at the time of the filing of the original information against the same in this action within said southern district of New York in the custody of Max Weber, esquire, collector of internal revenue for the second collection district of the State of New York, to recover a forfeiture thereof imposed by the internal revenue laws of the United States, and that the property before mentioned and described was found on the 23d day of May, in the year one thousand eight hundred and seventy-five, within the said southern district of New York, and within the said collection district, by the said Max Weber, esquire, who was then and there collector as aforesaid, on land, at a certain place, and within certain buildings, rooms, yards, and enclosures, constituting and connected with the premises known as 72 Courtlandt street, in the city of New York, and was, then and there, seized by the said collector for the forfeiture aforesaid, and has since remained in his care and custody as forfeited to the United States, as aforesaid, until the monition, etc., hereinbefore issued were executed.

And the said attorney for the United States, now here, prosecuting in the name of the United States in that behalf, doth articulately propound the matters relied on as grounds or causes of the said forfeiture, as follows:

That the spirits above described were prior thereto produced and owned by Louis Tenscher, who was then duly authorized to carry on the business of a distiller in the first internal revenue collection district of the State of Missouri, and who was then and there, and while he was owner of the spirits aforesaid, engaged in carrying on the business of a distiller with intent to defraud the United States of some part of the tax on the spirits distilled by him.

Second. That said spirits were thereafter, and prior to said seizure, owned by Bensberg, who then was duly authorized to carry on the business of a rectifier upon premises in the collection district aforesaid; that prior to said ownership of said Bensberg, the Commis-

sioner of Internal Revenue, pursuant to law, made a regulation which was, prior to said ownership by Bensberg, communicated to all persons concerned, requiring a certain return in certain cases from rectifiers, which return is, and was then and there, known as Form 122, and is hereto annexed and marked A.

That said Bensberg, while his ownership of said spirits continued, and with the purpose and intention of obtaining the issue to him of stamps for rectified spirits, to be placed upon certain other spirits upon which the tax had not been paid, and for the purpose of evading said tax, and enabling him to dispose of the latter mentioned spirits without compliance with any requirement of law respecting them, falsely made returns to the collector of the collection district aforesaid upon Form 122 aforesaid; that the spirits first above mentioned were emptied for rectification upon his premises aforesaid, and the stamps, marks, and brands thereupon effaced and obliterated, and that said Bensberg, then and there, by means of a bribe of money for that purpose paid by said Bensberg to a certain United States gauger, who was then and there charged with the duty of inspecting the emptying of packages of spirits for rectification upon the premises aforesaid, and of making his certificate relating thereto, as set forth in Form 122 aforesaid, and of making a report relating thereto to said collector upon a form duly, by the Commissioner aforesaid, according to law, for that purpose prescribed, and known as Form 59, whereof a copy is hereto annexed and marked B, induced said gauger to make his certificate upon Form 122 as aforesaid, and the return upon Form 59 aforesaid; that the packages of spirits first above mentioned were emptied upon said premises, and the stamps, marks, and brands upon them effaced and obliterated, while in truth and in fact such returns, Form 122 and 59, and said certificate, were wholly false, and said packages were not emptied, or said stamps, marks, or brands effaced or obliterated, but on the contrary thereof said packages were subsequently shipped and delivered to the claimant in this action, and said Bensberg then and there conveyed to

said claimant all the right, title, and interest therein which he could convey, in view of the facts hereinbefore alleged, against the form of the statutes of the United States in such case provided, whereby, and by force of the statute of the United States in such case provided, the said distilled spirits, and the casks, vessels, cases, and other packages containing them became and are forfeited to the United States.

And therefore, by reason of all and singular the premises aforesaid, the said attorney for the United States, on behalf of the United States, prays the court that due process issue to enforce the said forfeiture of the said property found and seized as aforesaid, and to give notice to all persons concerned in interest to appear and show cause, on the return day of the process, why the said forfeiture should not be decreed. (Record, 5 to 7.)

It was admitted that all proceedings prior to the filing of the foregoing amended information were regular and such as to give the court full jurisdiction of the cause. (Record, 11, middle.)

Exhibit A, Form 122, was a "Rectifier's notice of intention to rectify," stating in tabular form the number, marks, contents, and particulars of the casks he proposed to empty for the purpose of rectification, signed by the rectifier, and having at the bottom a certificate of a United States gauger that he had made an actual gauge of the spirits, seen the same emptied and the stamps destroyed, and that the column stating contents was correctly filled up. (Record, 8.)

Exhibit B, Form 59, was a gauger's return of spirits gauged by him for the distiller or rectifier. (Record, 9.)

To this information a demurrer was filed (record, 10, middle), and the only question is as to the legal sufficiency of the facts stated to sustain the judgment of condemnation entered in the cause. (Record, 11, top.)

The information is founded upon this section of the Revised Statutes:

"SEC. 3451. Every person who simulates or falsely or fraudulently executes or signs any bond, permit, entry, or document required by the provisions of the internal-revenue laws, or by any regulation made in pursuance thereof, or who procures the same to be falsely or fraudulently executed, or who advises, aids in, or connives at such execution thereof, shall be imprisoned for a term not less than one year nor more than five years, and the property to which such false or fraudulent instrument relates shall be forfeited."

BRIEF.

The above-printed section (3451) punishes by imprisonment the false or fraudulent execution of any document "required by the provisions of the internal-revenue laws, *or by any regulation made in pursuance thereof*"; denounces an equal penalty against every one who procures, advises, aids in, or connives at such execution, concluding with this declaration: "And *the property to which such false or fraudulent instrument relates* shall be forfeited." (Record, 12, beginning of opinion per Waite, C. J.; ante, p. 5.)

Revised Statutes, Sec. 321, authorizes "the Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury," * * * to "prepare and distribute all the instructions, regulations, directions, forms, blanks, and other matters relating to the assessment and collection of internal revenue." * * * (*Ib.*)

The concluding sentence of Section 3249 of the Revised Statutes further empowers him to "prescribe rules and regulations to secure a uniform and correct system of inspection, weighing, marking, and gauging of spirits."

The regulation requiring Form No. 122 says:

Whenever any rectifier proposes to empty any spirits for the purpose of rectifying, purifying, refining, redistilling, or compounding the same, he will file with the collector a notice or statement giving the number of casks or packages, the serial number of each, the number of wine and proof gallons in each, the kind of stamps and serial numbers of each, the particular name of such spirits as known to the trade, the proof, by whom produced, the district where produced, by whom inspected, and the date of inspection.

This notice will be in the following form (No. 122 revised):

To ——— ———,
*Collector* ———, *district of* ——— :

Notice is hereby given that I will empty, for the purpose of rectification (redistilling or compounding, as the case may be), the following-described packages of distilled spirits, to wit, ——— barrels, upon which are the following stamps, marks, and brands:

See the "Regulations and instructions concerning the tax on distilled spirits," approved July 24, 1872, being series 6, No. 7, United States Internal Revenue, page 70 of the edition of 1876, and page 64 of the prior edition.

The tabulations of Form 122 revised appear in the record, page 8, and are therefore omitted here.

Upon page 63 of the 1876 edition, and on page 58 of the earlier edition, will be found the requirement that "gaugers will inspect, brand, and stamp all spirits required by law to be inspected," &c. * * * "Returns of inspections are to be made daily, in duplicate, to the assessor and collector, containing true account in detail on Form 59," &c. This form is found upon page 9 of the record.

These regulations and forms are mentioned in Chief Justice Waite's opinion, and the detail of the operations is specifically described. (Record, 12, 13.)

The information was originally filed in the United States district court in New York City (record, 5), where it was demurred to (*ib.*, 10), the demurrer overruled, and judgment entered for the United States with a decree of condemnation. (*Ib.*)

The cause was then taken to the United States circuit

court, and three errors were assigned to the decree of condemnation, viz:

"1. The regulation requiring the certificate and report alleged to have been falsely and fraudulently executed was not made pursuant to law;

"2. The regulation, if valid, has reference only to the stamping of *rectified* spirits, and does not affect those that are unrectified, and upon which the tax on distilled spirits has been paid; and,

"3. The false documents complained of did not 'relate' to the spirits in respect to which the certificate and report were made, but only to such as should have affixed to them any stamp obtained by means of the fraudulent device complained of." (Record, 13, 14.)

Probably no other errors can be or will be assigned in this court, so the above-mentioned will be considered in the order in which they are above stated. The plaintiff's brief is not yet filed, so we must rely solely, for the present, upon the bare statement of his objections.

I.

Was the regulation requiring Form 122, and the certificate thereon, and return No. 59, made pursuant to law?

1. The indictment annexes and refers to them as exhibits, and avers that the forms and return thus exhibited were required by regulations made by the Commissioner pursuant and according to law. This was a statement of fact as to these two exhibits. Its truth is admitted by the demurrer.

2. Until the plaintiff files his brief and states some reason for considering the regulations concerning these documents unreasonable, or in what respect they are invalid or contravene any clause of the internal-revenue law, I shall assume with the Chief Justice (record 14,

top), that they are reasonable and in conformity with and in execution of the law.

3. These regulations are expressly authorized by law. When made and promulgated they become themselves law. (United States *v.* Eliason, 16 Peters, 291; United States *v.* Freeman, 3 Howard, 566; Hickey *v.* Huse, 56 Maine, 493, 495–'6.)

Having this effect so given to them, they are things of which this court takes judicial cognizance, and will, to refresh recollection, refer to the authorized publication cited by me, approved by the Secretary of the Treasury, July 24, 1872, or to any other appropriate source of information.

II.

The regulation and form themselves show that they do *not* relate to rectified spirits or the stamping thereof, but to *distilled* spirits; though it is true that it is expected these distilled spirits will be rectified. The notice is of the number of casks of *distilled* spirits which the rectifier will empty for the purpose of rectification, and the accompanying certificate of the gauger certifies to the quantity of *such* spirits he has gauged and seen emptied for that purpose; to which also his return on Form 59 relates.

III.

As last above noted, the false statements and returns did relate, precisely and exclusively, to these very spirits that were seized, and to none other. The rectifier stated, and procured the gauger to vouch for and certify the truth of the statement, that these spirits had

been dumped; and the gauger returned them as gauged for this purpose.

True, the intention was fraudulently and gratuitously to obtain stamps to be put upon certain rectified spirits on which no tax had ever been paid; but to accomplish this design a false statement was made in relation to the spirits here claimed.

EDWIN B. SMITH,
*Assistant Attorney-General.*

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